# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES NEW YORK BRANCH OFFICE

MOUNTAINSIDE FARMS, A DIVISION OF WORCESTERCREAMERIES CORP.

and Case No. 3-CA-097023

TEAMSTERS LOCAL UNION NO. 693

Greg Lehmann, Esq., of Albany, New York, for the Acting General Counsel.

Kenneth L. Wagner, Esq., of Syracuse, New York, (Blitman & King, LLP), for the Charging Party.

Brian S. Carroll, Esq., Dayton, Ohio, (Burdzinski & Partners, Inc.), for the Respondent-Employer.

#### **DECISION**

#### Statement of the Case

Kenneth W. Chu, Administrative Law Judge. This case was tried on July 15, 16 and 17, 2013¹ in Albany, New York pursuant to a complaint and notice of hearing issued by the Acting Regional Director for Region 3 of the National Labor Relations Board (NLRB or Board) on April 26, 2013 (GC Exh. 1).² The complaint alleges that Mountainside Farms, a Division of Worcester Creameries Corp. in Roxbury, New York (the Respondent or employer) violated Section 8(a)(5) and (1) of the National Labor Relations Act (NLRA or Act) by unilaterally implementing a new health insurance plan and changed the wages of unit employees before bargaining with the Teamsters Local Union No. 693 (the Charging Party or Union) to a good faith impasse (GC Exh. 1).³ Respondent filed a timely answer to the complaint denying the material allegations in the complaint.

After the close of the hearing, the briefs were timely filed by the parties, which I have carefully considered. On the entire record, including my observation of the demeanor of the

<sup>&</sup>lt;sup>1</sup> All dates are in 2012 unless otherwise indicated.

<sup>&</sup>lt;sup>2</sup> Testimony is noted as "Tr." (Transcript). The exhibits for the General Counsel and Respondent are identified as "GC Exh." and "R Exh." The closing briefs are identified as "GC Br." for the General Counsel, "CP Br." for the Charging Party and "R Br." for the Respondent.

<sup>&</sup>lt;sup>3</sup> Counsel for the General Counsel moved to amend the complaint on July 9, 2013 to identify John Eckstein as the corporate controller of the Respondent at the time of the complaint and that he acted as a supervisor and an agent of the Respondent consistent with Section 2(11) and 13) of the Act. The Respondent did not oppose the amendment to the complaint (GC Ex. 1; Tr. 15).

#### **Findings of Fact**

#### I. Jurisdiction and Labor Organization Status

The Respondent, a New York corporation, is engaged in the operation of a dairy processing facility in Roxbury, New York. During a representative 1 year period, the Respondent purchased and received goods at its Roxbury plant valued in excess of \$50,000 directly from points outside the State of New York. Accordingly, I find, as the Respondent admits, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

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#### II. The Alleged Unfair Labor Practice

a. The collective-bargaining negotiations in 2011

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The Union is the exclusive collective bargaining representative of the Respondent's employees in the following appropriate bargaining unit of

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All full-time regular employees employed by Respondent at its Roxbury, New York plant; excluding Department Heads, Managers, Assistant Managers, Supervisors, Field Men, Maintenance Engineers and Office Employees.

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The Respondent and the Union have been party to a series of collective-bargaining agreements for over 20 years, the most recent from August 1, 2008 to July 31, 2011 (GC Exh. 2). Bargaining for a successor agreement began on June 22, 2011. At all times during bargaining, Roberta Dunker (Dunker), the union president, served as the chief negotiator with David Doroski (Doroski) and Sandy Doyle (Doyle) as members of the Union's bargaining team.<sup>5</sup> The employer's general manager, Ray Bachelder (Bachelder), served as the chief negotiator and spokesperson for the Respondent's bargaining committee. John Eckstein (Eckstein) also served on the bargaining team<sup>6</sup> (Tr. 246). Cyndi Sauter (Sauter), an attorney, was added to the employer's bargaining team as a labor consultant in January 2012 (Tr. 20).

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The parties stipulated to 14 bargaining sessions. The parties met and bargain in 2011 on following dates: June 22, July 20, August 17, October 5, October 26, November 16, and December 17. In 2012, the parties met and bargain on January 18, March 7, March 21, April 18, May 9, September 5, and October 15 (Tr. 12, 13).

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Doroski and Doyle are employed by the Respondent and are members of the bargaining unit.

<sup>&</sup>lt;sup>4</sup> The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was not credible and unworthy of belief.

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<sup>&</sup>lt;sup>6</sup> Eckstein subsequently became the chief negotiator after Bachelder left the company in January 2013 (Tr. 21, 253).

The critical issues for the parties throughout negotiations were the health plan coverage, unit employees' contribution to the health plan, and wages. After months of bargaining, the Respondent declared impasse and implemented various proposals contained in its Last, Best and Final Offer (LBFO).

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#### The June 22 meeting

At the initial bargaining session on June 22, the Union submitted its proposal to the Respondent (GC Exh. 3). Dunker testified that the Union proposed a 99-cent-an-hour wage increase and no changes to the current insurance coverage (Tr. 21-23). Dunker informed the employer that the unit employees wanted to stay with the health plan in the expired contract and proposed no changes in the health insurance coverage.

The unit employees were covered under the New York State Teamsters Council Health and Hospital Fund Select Care Plan (Teamsters Select) under Article 18 of the expired contract (GC Exh. 2). Under Teamsters Select, the unit employees was responsible for a \$20 co-pay for medical visits; an employee contribution to the health coverage of \$15 per week for a single individual, \$28 for a couple and \$35 per family. The employees were also provided up to \$5,000 for dental coverage, dental braces up to \$2,900, and a free pair of eyeglasses per year. The monthly health cost to the employer under this plan in 2011 was \$542.10 per individual, \$1,084.63 per couple and \$1,491.10 per family (Tr. 22, GC Exh. 2 at p. 15).

At this session, Eckstein informed the Union that the Respondent wanted to move away from the Teamsters Select plan. He said that the Respondent was unsuccessful in getting a different health plan during negotiations with the Union for the expired contract in 2008 and was prepared to propose an alternative health plan. The Respondent did not propose an alternative health insurance at this session. However, Eckstein did request from Dunker the insurance rates for the Teamsters Select plan for the next three years. Eckstein said that he wanted to compare the rates of the Teamsters Select plan projected over 3 years. He made it clear that under no circumstances should this be taken as a signal that the Respondent was keeping this plan. Eckstein followed his information request with an email to Dunker on June 24, 2011 (Tr. 246-250; R Exh. 1). Eckstein received a reply from Dunker by email on July 20, 2011 regarding the medical, dental and vision costs. The monthly health cost to the employer under Teamsters Select was projected to increase in 2014 by \$662.74 per individual, \$1,325.13 per couple, and \$1,821.60 per family (R. Exh. 3).

#### The July 20 meeting

On July 20, 2011, the parties held their second bargaining session. At this session, the Respondent proposed to change the health insurance coverage to Excellus Blue Cross/Blue Shield (Excellus Blue) and to increase the employee contribution to the health insurance cost to 35 percent (GC Exh. 4). Eckstein testified that the current contribution was at 9 percent, which he believed was extremely low. He also stated that his review of projected increases in the health cost under the Teamsters Select were extremely high for the employer (Tr. 253, 259; R. Exh 3).

The Union did not offer a counterproposal on health insurance. Dunker reiterated to the Respondent's bargaining committee that the employees preferred to stay with the Teamsters Select plan (Tr. 99-102, 254).

#### The August 17 meeting

At the August 17, 2011 meeting, the Respondent distributed a document to the Union detailing four health insurance plans. Although the handout was not made part of the record, it seems from Eckstein's bargaining notes that the employer's health cost would be \$487.57 for an individual; \$946.31 for a couple; and \$1,535.40 for a family, which was lower than the projected cost under the Teamsters Select plan. Eckstein testified that the employer was not proposing any one of the four plans but merely presented the handout to the Union in order "...to engage and get their interest" in an alternative health coverage (Tr. 260, 261; R Exh. 4). Dunker testified that the Union had not changed its position to keep Teamsters Select and did not propose an alternative health plan at this session (Tr. 99-101).

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#### The October 5 meeting

At the October 5, 2011 bargaining session, the Respondent reiterated to the Union that it needed to reduce its health insurance cost and increase the employees' contribution to their health plan. The Union's position to keep Teamsters Select and a proposed 99-cent-an-hour wage increase did not deviate at October 5 session (Tr. 103). However, Eckstein recalled (as reflected in his bargaining notes) that the Union might consider an insurance plan with a high deductible that included either a Health Reimbursement Account (HRA) or Health Savings Account (HSA) (Tr. 263, 264, R Exh 5).

#### The October 26 and November 16 meetings

The parties' positions on health insurance coverage and wages did not change at the October 26 and November 16, 2011 bargaining sessions and no new proposals were presented. Eckstein testified that the Union requested information on insurance rate quotes on a high deductible insurance plan with a HSA account at the October 26 session. Eckstein agreed to obtain the information for the Union and he contacted Kaatirondack Benefit Planning (Kaatirondack), an insurance brokerage firm, on October 27 to obtain quotes from Excellus Blue on a high deductible coverage plan. He also authorized Excellus Blue to provide the quotes to Kaatirondack.<sup>8</sup> Eckstein said that he was willing to entertain the Union's request although the Respondent was not proposing an insurance plan with a HSA account (Tr. 262-270; 309; R Exh. 7 and 8).

#### The December 7 meeting

At the December 7, 2011 bargaining session, the Respondent offered its second proposal on health benefits and wages (GC Exh. 5). The Respondent now proposed a health insurance plan under Excellus Simply Blue Hybrid with a HRA employer contribution of \$2,500 per family, \$1,000 per couple and \$500 per individual on an annual basis. The Respondent believed that the HRA proposal was being responsive to the Union's consideration of a HSA

<sup>&</sup>lt;sup>7</sup> Under either a HRA or HSA plan, the employer set aside a specific amount of money for the employees to use when there is a high deductible or co-pay for medical expenses. Under a HRA plan, the money that was set aside and not used by the employees is kept by the employer. Under a HSA, the money set aside by the employer is kept in the employee's account for other purposes and could be rolled-over into a 401(K) account (Tr. 28; 270, 271).

<sup>&</sup>lt;sup>8</sup> At the time, Jaeger & Flynn was the sole insurance brokerage firm for the Respondent. Eckstein contacted Kaatirondack only for the purpose of obtaining health quotes pursuant to the Union's request (Tr. 266).

plan. The proposal included a \$10 increase in the employee's weekly contribution to the health plan. Eckstein testified that the \$10 increase would place the employees' contribution to their health plan at 11 percent or 12 percent. At this session, the Respondent dropped its initial proposal of a 35 percent contribution by the employees to their health plan (Tr. 271, 272).

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The Respondent also proposed, for the first time, a 15-cent-an-hour wage increase and an additional 15 cent-an-hour in each year of a 3 year contract (Tr. 273). The Respondent viewed the insurance cost, the employees' contribution to the insurance and their wage rate as a linked proposition. Eckstein insisted that the Union was aware that wages and health cost contribution were linked from the beginning of negotiations (Tr. 273, 274)

The Union was opposed to the Excellus Blue plan because there was a high deductible with a HRA account whereas Teamsters Select did not have these features. The Union was also upset over the \$10 weekly increase in health contribution, which was in addition to their weekly contribution of up to \$40 per week (Tr. 27, 104-107). The Union also rejected the proposed 15-cent-an-hour wage increase. It is not in dispute that the Union did not offer a counterproposal on an alternative health plan or wage rate at the December 7 session.

### b. The collective-bargaining negotiations in 2012

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In January 2012, the Respondent added Sauter to its bargaining team. Sauter testified that she is an attorney specializing in labor relations and the Respondent retained her to participate in the negotiations (Tr. 392-394).

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#### The January 18 meeting

The parties met on January 18. The position of the Union on the wage and health insurance issues did not change (Tr. 107, 108). After the January 18 session, Eckstein sent an email to Kaatirondack to follow up for the insurance plan rates that he had previously requested in October 2011. The rate information provided by Kaatirondack reflected a cost savings to the employer from \$23,400 to \$27,000 dollars under two alternative insurance plans (R Exhs. 9, 10). It is not in dispute that the Union never proposed any of the alternative plans that were obtained by Kaatirondack through the employer at the Union's request. Dunker testified that she needed to meet with the bargaining unit employees before deciding on any new insurance proposals.

Dunker met with the unit employees in early March to discuss the Excellus Blue/HRA insurance, but the employees voted to reject the proposal (Tr. 30-33). Dunker testified that the unit employees also rejected the HSA insurance plan that Kaatirondack had previously provided to Eckstein. Dunker said that the unit employees wanted to stay with the Teamsters Select plan (Tr. 123-125).

#### The March 7 meeting

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On March 7, the parties met again. At this session, the Respondent dropped Excellus Blue and proposed an alternative insurance called the Capital District Physicians' Health Plan (CDPHP). Eckstein testified that the CDPHP had a Medical Expense Reimbursement Plan (MERP) account instead of a HRA account and believed a MERP account would provide the employees with more employer contributed funds for the high medical deductibles. Dunker testified that she did not fully understand the details of a MERP account, but acknowledged that individuals, couples and families would be provided with more employer contributions than

under Excellus Blue. Eckstein said that the Respondent was attempting to devise a health plan that would provide the employees with better benefits than the Teamsters Select Plan. However, Eckstein was told by Dunker that CDPHP and Excellus Blue were essentially the same plan and did not believe the unit employees would accept CDPHP after rejecting Excellus Blue (Tr. 279-281).

At the March 7 session, the Respondent's proposal for a 15-cent-an-hour wage increase for each year of the contract was unchanged (Tr. 32, 33; GC Exh. 6). Dunker acknowledged that that Union did not provide a counterproposal on the health insurance at the March 7 session and remained steadfast to no increases in the employee contribution of \$10 per week to the insurance plan and to the 99-cent-an-hour wage increase (Tr. 108-110).

Eckstein's March 7 bargaining notes indicated that there would be further discussions on dropping the MERP component and reverting back to the HRA coverage in the Respondent's next proposal. The notes also reflect the possibility of adjusting the dental and vision benefits to equal or better the Teamsters Select plan. The bargaining notes also reflected Eckstein's belief that the next proposal would be the Respondent's final offer (R Exh. 11).

#### The March 21 meeting

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At the March 21 session, the Union, for the first time, moved away from its 99 cents wage proposal to a 65-cent-an-hour increase. The parties also tentatively agreed on some contract articles, but Union's position on health insurance remain unchanged (Tr. 34, 35, 112-114; GC Exh. 7). Eckstein testified that the Union did not propose an alternative plan after rejecting the CDPHP proposal and had still refused any proposed increases to the employee weekly insurance contribution (Tr. 289, 290).

Sauter testified she was present at the bargaining session on January 18 and March 21. Sauter corroborated Eckstein's testimony that the Union insisted on retaining the Teamsters Select plan and not to contribute any more to the health coverage. Sauter said that the Respondent's bargaining team consistently made clear to the Union that the Teamsters Select plan was not an option for consideration. Sauter testified that the Union outright rejected the CDPHP proposal. Sauter confirmed that the Union had reduced its wage demand from 99 cents to 65-cent-an-hour (Tr. 395-398).

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#### The April 18 meeting

The parties bargained on April 18 and the Respondent proposed to keep the CDPHP insurance, but with a HRA account and dropping the MERP component. The Respondent continued to insist on the extra \$10 weekly employee contribution to the health insurance, but proposed a 25-cent-an-hour wage increase for each year of a three year contract (GC Exh. 8).

Eckstein testified that the Respondent proposed to increase wages from 15 cents to 25-cents-an-hour because Dunker was complaining that the unit employees were "losing ground" due to the proposed increase in the extra \$10 weekly contribution. The Respondent thought that increasing the wages would off-set the \$10 contribution to the satisfaction of the employees. Eckstein said that Dunker believed the extra \$10 weekly contribution was not necessary to fund the insurance and that the revised CDPHP was still inferior to the Teamsters Select plan. Eckstein testified that the Union was also adamant in proposing a 65-cent-an-hour wage rate (Tr. 291, 292). Dunker testified that CDPHP was inferior because Teamsters Select did not have any deductibles; there was greater number of health providers under the union plan and Teamsters Select had more benefits in dental/vision coverage.

It was at this time that Dunker became aware that the union also offered a less costly health plan called the Teamsters HRA, but she did not begin to explore the possibility of this plan until early fall. At this session, Dunker again rejected the \$10 extra per week employee contribution to the health plan (Tr. 116-119).

### c. The Respondent's last, best, and final offers and impasse

#### The May 9 meeting

At the May 9 bargaining session, the Respondent held firm on the insurance plan (CDPHP/HRA account) proposed at the April 18 session, but increased the wage rate from 25 cents to 35-cent-an-hour for a 3 year contract (GC Exhs 8, 10). The Respondent also proposed that if health costs increased by 10 percent from the previous year, the Respondent would have the option to modify or reduce benefits after consulting with the Union (Tr. 44-46).

Dunker testified that the Union was not interested in a HRA plan and that the unit employees could not afford the \$10 weekly contribution even if there was a 35 cent-an-hour wage increase. Dunker argued that a 35 cent increase would still put the employees at a loss of \$4 per week because of the extra \$10 contribution. She also reiterated that CDPHP was an inferior health plan with respect to its vision and dental benefits. At this meeting, the Union did not change its position for a 65-cent-an-hour wage increase. Dunker also indicated that the unit employees did not trust the employer in maintaining the funds for the HRA plan (Tr. 126-129).

Eckstein stated that the parties were getting close to reaching an impasse by May 9. He testified that by May 9, the employer was "strongly considering a last, best and final offer" (Tr. 293). Eckstein testified that he recalled Bachelder telling Dunker that [...we are] at an impasse." Eckstein did not recall telling the Union that the parties were at impasse on May 9, but he supported the assertion made by Bachelder that the parties were at impasse (Tr. 324-327).

Dunker denied any recollections that the Respondent had said to the Union's bargaining team that the employer was "...getting to the end of its rope and really wanted to get this health insurance squared away" and that "...if things didn't change, that the [Respondent] would be looking at instituting a last best and final offer" (Tr. 131, 149).

Souter testified that she was presented at the May 9 bargaining session. She recalled her frustration that the Union did not move from its position on health insurance and wages. She specifically informed the Union bargaining team that the employer was "...about at the end of our rope..." She also expressed to the Union's bargaining team that the employer is talking "...about a last, best and final offer..." during this session, but the employer was not ready to implement the LBFO. Souter also said that Dunker did not believe the parties were near impasse and warned the employer "not to go down that path" (Tr. 402-410).

Eckstein also expressed frustration that not all the information about the benefits of the Respondent's proposed insurance was reaching the unit employees. He thought that an information meeting would be helpful to explain the employer's health coverage, especially with those employees who are Medicare eligible and how the move to Medicare would affect their health benefits under the proposed insurance (Tr. 293-295).

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#### The June 12 informational meeting

The Respondent, clearly frustrated with the stalemate with the Union over the insurance proposal, held an informational meeting with the unit employees on June 12. The purpose of the meeting was to inform the bargaining unit employees about the proposed CDPHP/HRA insurance (GC Exhs 9, 11). Souter asked Dunker for permission to hold the informational meeting with the unit employees and that Dunker agreed to the meeting. Dunker testified that the employer mandated the meeting and that the Union never agreed to it.<sup>9</sup> Nevertheless, Dunker attended the meeting at the invitation of Bachelder (Tr. 41, 42, 132, 133).

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Dunker testified that she attended the portion of the information meeting dealing with the Medicare benefits because some of the unit employees eligible for Medicare were concerned about the impact to their health benefits once forced to transfer over to Medicare. Dunker further testified that she met with the unit employees immediately after the information meeting. She said that the employees rejected the CDPHP/HRA proposal and the \$10 extra weekly contribution. Dunker said she informed the employees that the employer had been rejecting the Teamsters Select plan since June 2011, but the employees nevertheless insisted to remain with that plan. Dunker believed that she had informed Bachelder that the Union had rejected the proposed insurance plan prior to the next bargaining session (Tr. 40-43, 132-139).

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#### The September 5 meeting

On September 5, the parties held another bargaining session. The Respondent offered another proposal that was captioned in bold letters, "LAST, BEST, FINAL OFFER." The proposal was now for a 2 year contract with a new expiration date of July 31, 2014 instead of the three year contract proposed on May 9. In addition, the September 5 proposal would eliminate the provision in the May 9 proposal that allowed the Respondent to modify or reduce benefits if the insurance premium rates increased by more than 10% in the prior year. The September 5 proposal would instead increase the HRA allowance to match any increases in the health plan deductibles. Eckstein testified that the LBFO of September 5 did not have any significant changes from the LBFO of May 9 even though the September LBFO was for 2 years and the employer dropped the provision that would reduce health benefits if the health costs increased by 10 percent (Tr. 329-332). The effective date of the CDPHP insurance was on November 1. There were no changes in the wage rate, which remained at 35 cents (GC Exh. 12).

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Dunker informed the employer's bargaining team that the unit employees wanted to stay with the Teamsters Select plan. Dunker also said that she could work with the 35-cent-an-hour increase if it was retroactive to the expiration of the old contract, but still had big problems with the \$10 weekly employee contribution (Tr. 145-148). She was willing to go with a HRA account, but she thought there was room to negotiate down the \$10 contribution. Dunker did not believe the parties were at impasse because the Union had just agreed to the employer's proposed wage rate and is now considering an insurance plan with a HRA component (Tr. 150-156).

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Dunker believed that the Respondent had stopped negotiating in good faith at this session because the Respondent proposed a LBFO when the Union was showing movement on the insurance and wage issues. Dunker testified that the Union was negotiating in good faith because she did not outright reject the LBFO, but was willing to take the proposal back to the

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<sup>&</sup>lt;sup>9</sup> The contention that the Respondent held a mandatory meeting with the unit employees without notice and consent of the Union was not alleged in this complaint.

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bargaining unit employees for a ratification vote.

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Eckstein testified that he did not foresee any more negotiations if the unit employees voted down the September LBFO because the Union was unwilling to move off the Teamsters Select plan. Eckstein did not recall if he had mentioned impasse during this session. Eckstein did recall that Bachelder told Dunker that the parties were at impasse, but did not recall Bachelder telling Dunker that further negotiations were futile at the September 5 session (Tr. 335-337). Indeed, Eckstein said there was some possibility that the Union might be willing to agree to a smaller increase in wages if the employer was willing to decrease the \$10 weekly contribution and that the employer "...was open to negotiations and we're looking forward to the contract" (Tr. 298-300, 337).

Souter recalls that the parties discussed impasse at the September 5 session. She also insisted that the Union never moved on its 65 cent-an-hour wage increase. She did not recall that Dunker had mentioned the possibility of an insurance plan with a HRA account. Souter said that all Dunker did was to "whine" that the employer's LBFO would not get pass the unit employees and warned the Respondent "not to go down the (impasse) path" (Tr. 407-410).

Dunker denied that anyone discussed impasse at this session or said that additional bargaining would be futile. Dunker described a similar situation at the time when the parties were negotiating for the expired contract. Dunker said that the union went and negotiated directly with the employer's owner, Cyrus Schwartz, when the Respondent proposed to eliminate the Teamsters Select plan under the expired contract; Dunker said the Respondent then changed its proposal on the insurance and the Union was successful in retaining the Teamsters Select plan under the expired agreement. Dunker's reasoned that if the parties continue to negotiate despite there being a last best and final offer, the parties would eventually have similar success in agreeing to a new contract (Tr. 48-52, 150, 171).

Following this session, the Union scheduled a meeting and a ratification vote on September 29 on the LBFO.

#### The September 26 insurance enrollment

On September 26, the employer began the enrollment process to bring the bargaining unit employees under the proposed CDPHP/HRA insurance plan (GC Exh. 13). The enrollment forms specified that November 1 was the effective coverage date for the new insurance. The enrollment of the bargaining unit employees under the new insurance coverage was completed by September 29 or early October (GC Exhs. 32-36).

Doroski informed Dunker that the employer was asking the unit employees for their checking accounts. When contacted, Bachelder informed Dunker that the account numbers were needed in order to enroll the employees under the new insurance. Dunker asked Bachelder to hold off on the enrollment and not to do anything at this time. She said to him that the unit employees had not yet voted on the LBFO. Dunker again informed Bachelder that the unit employees might be willing to go with a HRA account and that the \$10 weekly contribution could be reduced through negotiations. According to Dunker, Bachelder told her that the matter was now out of his hands (Tr. 51-54).

Eckstein testified that the unit employees were informed that a last, best and final offer was made to the Union on September 5. Upon examination, Eckstein testified to the following

Q. What were the employees told the reason for completing the enrollment forms?

- A. The people were notified that we had made a last, best and final offer. We were at an impasse and that we had given notice that as a part of the package we would be providing CDPHP insurance November 1.
- Q. The employees, on September 26, the employees were notified that the company, that the parties were at impasse?
- A. I believe we communicated that we were, we had made our last, best and final offer.

Eckstein then hesitated that the Respondent had in fact informed the unit employees on September 26 that the parties were at impasse (Tr. 349, 350).

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Eckstein said that the employer began enrolling the employees under the CDPHP/HRA on September 26 because the effective date for the new insurance was November 1. He knew that the unit employees were scheduled to vote on the LBFO on September 29 and had hoped that the LBFO would be ratified by the Union before the November 1 implementation date (Tr. 347-356).

However, unfortunate for Eckstein, the unit employees met on September 29 and voted to reject the LBFO of September 5. Dunker testified that she related the rejection to Bachelder on October 1 and she suggested that the parties go back to the table to talk. By letter dated October 5, Bachelder confirmed that the parties were scheduled to meet on October 15 and that the Respondent was looking forward to "...sitting down and hearing what new thoughts the Union may have to resolve this matter. As such, we are ready, willing and able to meet." There was no mention of impasse in Bachelder's October 15 letter (Tr. 55, 56; GC Exh. 14).

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#### The October 15 meeting

The parties met on October 15. Dunker confirmed that the unit employees rejected the LBFO of September 5. Dunker also informed the Respondent's bargaining team that the Union intends to begin an information/handbill campaign with the customers and vendors to publicize the inferior contract proposals and the unfair treatment of the workers in the negotiations for a new contact (Tr. 57). In that context, the Union had sent a letter dated October 10 to Bachelder that informed the Respondent about the handbill campaign (GC Exh. 15). The letter began with a caption in bold words that stated

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#### CONSUMER BOYCOTT/HANDBILLING AT LOCATIONS SELLING DAIRY PRODUCTS

At the October 15 session, the Respondent presented another LBFO. The October 15 proposal stated that the "...present union insurance premiums payments will be made through October and new CDPHP coverage will begin November 1, 2012" (GC Exh. 16). Eckstein testified that the Respondent planned to implement the LBFO on October 21 (Tr. 306).

The LBFO of October 15 was identical to the LBFO presented on September 5 with one exception noted in paragraph 3 of the new proposal. The LBFO of September 5 in paragraph 3 read, in part,

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Second year will be effective on the anniversary date of this contract.

The LBFO of October 15 in paragraph 3 read, in part,

Second year will be effective on the anniversary date of this contract *in those years*.

Dunker said she did not know what was meant by "in those years" in the proposal and

was about to ask the Respondent for an explanation. According to Dunker, before she could ask for the meaning of that phrase, the employer's bargaining team "stormed out" of the room seemingly upset over the Union's intent to conduct a handbill campaign.

Eckstein testified that the language change was needed because Respondent was uncertain as to which years would be referenced when the agreement was eventually signed (Tr. 305). Dunker insisted that impasse was never discussed and she had no reason to believe that the employer was ready to impose its last offer after this session (Tr. 56-61).

Consistent with the intent to implement the CDPHP on November 1, the Respondent informed the New York State Teamsters Council by letter dated October 15 that it was no longer participating or making contributions on behalf of the unit employees in the Teamsters Select Fund effective October 21 (GC Exh. 17). Bachelder informed Dunker by letter dated October 24 that the unit employees would be covered under the existing Teamsters Select plan through the reminder of October and that their health coverage would then be under CDPHP effective on November 1 (GC Exh. 24).

Shortly after the October 15 session, Bachelder sent an email (GC Exh. 18) dated October 18 to Dunker with an attached letter (GC Exh. 18), which stated

I am in receipt of your letter regarding "consumer boycott/handbilling at locations selling dairy" dated October 10, 2012. As you know, after months of collective bargaining, the parties appear to be at an impasse. It is because of this impasse that we have previously forwarded to you our last, best and final offer. In addition, because of this impasse, we have notified you that we plan on implementing the last, best and final offer terms on Sunday, October 21, 2012. We believe you letter dated October 10, 2012 is a direct response to our informing you that we will be implementing our last, best and final offer.

Please be advised that it is still our intentions to implement our last, best and final offer at 12:00 a.m. on October 21, 2012. Should you desire to discuss any matters at the bargaining table, please let me know at your earliest convenience.

According to Dunker, this was first time the Respondent had mentioned impasse (Tr. 62, 172). Doroski testified that the employer never previously mentioned when the Respondent was going to implement the October 15 LBFO until Bachelder's letter was received. Doroski also testified that the Respondent never discussed impasse at any prior bargaining sessions (Tr. 212-216).

Upon receipt of the October 18 communication from Bachelder, Dunker replied in an email to inform Bachelder that she did not believe the parties were at impasse. The email stated, in part

I do not believe the parties to be at an impasse. We want to meet and see if we can talk about our disagreements. I am meeting with the men on Saturday and proposing an alternative agreement.

If you are serious about discussing matters at the bargaining table then you will not implement your contract.

Again I do not believe that we are at impasse. I await your reply.

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Although Dunker did not have a counterproposal for the Respondent on October 18, she did inform Bachelder in her email that the unit employees would be meeting to discuss an alternative insurance plan. Dunker also informed Bachelder in a phone conversation the next morning that she was looking at an alternative insurance plan and reiterated that the unit employees would be meeting on Saturday, October 20. She said that there would be a new proposal from the Union after their meeting (Tr. 172, 173). Dunker urged Bachelder "...to hold off implementing anything until after the meeting, that we could probably work something out." Dunker told Bachelder to hold off for one week, which would still allow time for the Respondent to implement its health proposal on November 1 if the parties failed to reach an agreement (Tr. 177, 197, 198).

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Bachelder replied to Dunker in a letter dated October 19 (GC Exh. 20). His letter stated

I am in receipt of your email dated October 18, 2012. I appreciate your prompt response to our last correspondence. By this letter I want to be very clear that the Employer's position on wages, benefits, and any other negotiated terms are set. In addition, we believe that further discussions on the issues will be futile. It is for these reasons that the parties are at an impasse.

Your email indicates that you will be proposing an alternative agreement to the employees on Saturday. Assuming the new proposal is agreed by the employees, please advise so that we can schedule another round of meetings. Please understand that because we are at an impasse, continuing to meet with the Union to discuss new proposals from the Union does not mean we are not an (sic) impasse. It simply means we are continuing to negotiate in good faith.

#### The October 20 union's proposal

Dunker said that the unit employees met on October 20 to discuss an alternative health plan, namely, a Teamsters plan with a high deductible and a HRA component. Dunker testified that the Teamsters plan had the same deductions as the employer's proposal with the only difference being that the HRA plan was with the Teamsters Council as the insurance provider. Dunker said under the Teamsters HRA plan, the unit employees would also have the same dental and vision coverage but, unlike the employer's CDPHP, the Teamsters HRA plan did not include a separate coverage for employees eligible for Medicare. Dunker said that she had been actively looking into the Teamsters HRA plan since September and when she was able to gather all the information about the plan, she presented the proposal to the unit employees (Tr. 162).

On October 20, the unit employees voted and ratified the Teamsters HRA high deductible health plan. Dunker testified that the unit employees also agreed to a 35-cent-anhour wage increase for the first 2 years of the contract and retroactive to the expiration date of the old contract or, in the alternative, with a bonus upon signing the contract (GC Exh. 21; Tr. 68-73, 119, 216, 217).

Dunker attempted to contact Bachelder on October 21 regarding the Union's proposal, but was unable to reach him because his cell phone was not accepting voice messages (Tr. 184, 185). She said that the proposal was subsequently hand delivered by Doroski to Bachelder on October 24. The Union's proposal was not immediately submitted to the employer after the ratification vote on Saturday October 20. Dunker admitted that the proposal was "supposed to go out on Monday," but obviously, it did not (Tr. 70).

### The October 21 implementation of Respondent's last, best and final offer

On Sunday, October 21, the Respondent implemented the terms of its LBFO of October 15, which included the CDPHP/HRA insurance plan, a 35-cent increase in wages, and an increase of \$10 employee weekly contribution for the insurance. Respondent also implemented certain tentative agreements regarding terms and conditions of employment, including new hire benefits, opt-out provisions for the health insurance coverage, posting all jobs when vacant, agreeing that managers will not perform bargaining unit work, and other provisions (GC Exhs. 7, 38).

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Souter testified that October 21 was selected as the implementation date for the LBFO because it was the beginning of the pay period for the unit employees. She said that the terms of the LBFO was implemented on October 21, including the discontinuance of the Teamsters Select Plan, the increase in the wage rate, any tentative agreements, and the extra \$10 employee contribution to the new health plan. She indicated that the November 1 start date for the new insurance plan did not detract from the fact that all aspects of the LBFO were implemented on October 21 (Tr. 413-415).

Doroski testified that he heard nothing from the employer about the Union proposal when he returned to work on Monday so he contacted Dunker and they realized that the proposal was never emailed or faxed to the employer. Dunker asked Doroski to deliver the proposal. It is not clear why he did not deliver the proposal on Monday. He testified that he did not work on Tuesday and gave the proposal to Bachelder on Wednesday, October 24 (Tr. 218-220). Also on Monday, Dunker mailed a letter with a copy of the proposal to Bachelder. In the letter, Dunker again stressed that the parties were not at impasse and the Union "...was willing to go back to the bargaining table to continue negotiations." In addition to the proposal, Dunker also attached a sample flyer that the Union intended to use in the handbilling campaign regarding the unfairness of the employer's proposals (GC Exh. 23).

Upon receipt of the proposal given by Doroski on October 24, Bachelder replied by email to Dunker on the same day to inquire if the Union wanted to return to the bargaining table. He also stated in his email that that he "was surprised by the proposal and need to understand how you would like to proceed" (GC Ex. 22). Dunker testified that she spoke to Bachelder on October 24 and he was willing to return to the bargaining table even after the implementation of the LBFO on October 21. The parties agreed to return to the bargaining table on November 19.

Eckstein testified that he knew the Union was proposing a Teamsters insurance plan with a HRA account, but had few details about the plan. He testified that the parties agreed to a meeting on November 19 to discuss the Union's proposal. He stated "We're always willing to sit down and negotiate as it's our obligation right" (Tr. 380).

The parties met on November 19 but because Souter had an illness in her family, the employer was reluctant to proceed with further negotiations (Tr. 72-76). Since November 19, some attempts were made to schedule another bargaining session, but no substantive movements have been made to bargain since the last session on October 15.

#### The Respondent's Defenses

The Respondent contends that the parties were at impasse in bargaining on September 5 when the Union was presented its last, best and final offer. The Respondent felt it was not making any progress on the outstanding issues, namely, health insurance coverage,

contribution to the insurance and wages. The Respondent states that it shared its belief that the parties were at impasse at the September 5 session. The Respondent argues that the parties were still at impasse on October 21, when the employer implemented its last, best and final offer. The Respondent maintains that the Union's counterproposal was not a valid offer because there were no substantial change in the Union's position on health insurance, but even assuming that it was and the offer broke the impasse, the employer did not violate the Act as the unilateral changes to the employer's terms and conditions of employment on October 21 occurred during impasse and the breaking of impasse happened on October 24, when the Union finally submitted its proposal to the employer.

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Alternatively, the Respondent argues that the single issue regarding health insurance coverage created an overall bargaining impasse that "privileges unilateral action" because the single issue is "of such overriding importance" to the parties that the impasse on that issue frustrates the process of further negotiations, citing *Calmat Co.*, 331 NLRB 1084, 1097 (2000). Finally, the Respondent contends that it always demonstrated a genuine willingness and flexibility to compromise during bargaining but it was the Union that had bargained in bad faith.

#### **Discussion and Analysis**

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#### a. The question of impasse

The general rule is that when the parties are engaged in negotiations for a new contract, an employer's obligation to refrain from unilateral changes encompasses a duty to refrain from implementation unless and until an overall impasse has been reached on the bargaining on the agreement as a whole. *Pleasantview Nursing Home*, 335 NLRB 961, 962 (2001).<sup>10</sup>

The Board does not lightly find an impasse. In *A.M.F. Bowling Co.*, 314 NLRB 969 (1994), enf. denied 63 F.3d 1293 (4th Cir. 1995), the Board defined impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile and where both parties believe that they are "at the end of their rope." The Board considers negotiations in progress and thus will find no genuine impasse to exist until the parties are warranted in assuming that further bargaining will be futile or that there is "no realistic possibility of continuation of discussion...would be fruitful." *Saint-Gobain Abrasives, Inc.*, 343 NLRB 542, 556 (2004). An employer violates Section 8(a)(5) and (1) of the Act by implementing its final bargaining proposals without reaching a bargaining impasse. *Cotter & Co.*, 331 NLRB 787 (2000).

The Respondent argues that impasse in bargaining was reached. Where the parties have reached the point where there is ample reason to believe that no useful progress could be made toward a total agreement, the Board may determine that the bargaining is at impasse. Whittier Area Parents' Assn., 296 NLRB 817 (1989).

Impasse is determined by assessing the totality of the circumstances. *Grinnell Fire Protection Systems Co.*, 328 NLRB 585, (1999), enfd. 236 F.3d 187 (2000). Whether a valid impasse has been reached is a factual determination that depends on a variety of factors relating to a pattern of behavior of the parties involved. In *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1969), enfd. 395 F.2d 622 (D.C. Cir. 1968), the Board enumerated some of the

<sup>&</sup>lt;sup>10</sup> The Board recognizes two exceptions to this general rule: when a union engages in bargaining delay tactics and "when economic exigencies compel prompt action." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). The first exception is at issue here and is addressed below.

factors it takes into account in determining if the parties have reached impasse. The Board stated

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Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors in deciding whether an impasse in bargaining existed.

These factors are an aid in determining whether the impasse is a valid one or shows an "overall pattern of behavior designed to frustrate the bargaining process." *Litton Microwave Cooking Products*, 300 NLRB 324, 330 (1990).

### b. The parties were not at impasse in bargaining on September 5

The Respondent allegedly informed the Union on September 5 that further negotiations would be futile and that the parties were at impasse. The Board has held that where a party declares an impasse, the burden of proof rests with the party claiming the impasse, here the Respondent. *L.W.D. Inc.*, 342 NLRB 965, (2004); *CalMat Co.*, above, 1097-1098; *CJC Holdings, Inc.*, 320 NLRB 1041 (1996).

The Respondent maintains that the parties were close to impasse by the time of the May 9 bargaining session. The Respondent informed the Union of its frustrations with the lack of movement on the health insurance coverage and wages, which the Respondent argues were linked as a single issue. The Respondent contends that the Union was informed that the employer was "at the end of our rope" at the May 9 session.<sup>11</sup>

The Respondent states that it attempted to break the deadlock over the health insurance coverage by convening an information meeting on June 12 to explain its proposed insurance plan to the bargaining unit employees. The Respondent felt that Dunker was not timely and adequately providing all the information about the insurance plan to the employees since she only met with the unit employees on an infrequent basis during negotiations.

The Respondent argues that the Union was aware from the first bargaining session in June 2011 that it wanted to replace the Teamsters Select plan. The Respondent maintains that the Union refused to give up the Teamsters Select plan even after it was provided with several alternative insurance proposals during bargaining. The Respondent believes that it tried to address the Union's concerns over the insurance coverage with each new proposal. The Respondent states that the Union was presented with its last, best and final offer on September 5 when further negotiations proved fruitless.

The Acting General Counsel contends that the parties were not at impasse on September 5 because there were significant changes made by the Respondent between the LBFOs of May 9 and September 5.

<sup>&</sup>lt;sup>11</sup> I find that the parties were not at impasse on May 9. The Respondent asserted that "it was at the end of its rope" on that date and that Eckstein testified he believed Bachelder told Dunker that the parties were at impasse (Tr. 324-327). Neither Dunker nor Doroski recalled any discussions regarding impasse on May 9. I find, at best, the record shows that the Respondent believes that "it was close to impasse" on May 9, but the parties have not reached impasse on that date. See, Respondent's closing brief at p.7.

I agree with the Acting General Counsel that the parties were not at impasse on September 5. The Respondent's May 9 proposal, which was purported to be its last, best and final offer, was significantly modified in the LBFO of September 5 and, therefore, should have been subjected to further negotiations.

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The LBFO of September 5 was for a proposed 2 year contract whereas the May proposal was for 3 years. In addition, the LBFO of September 5 modified the LBFO of May 9 by eliminating the provision that would have reduced health benefits if premiums increased by more than 10 percent. The Respondent's LBFO of September 5 proposed to offset the higher deductibles by increasing the employer contribution to the HRA account. The LBFO of September 5 also proposed an effective date of November 1 for the CDPHP/HRA insurance coverage, which was not in the May proposal (GC Exh. 10 and 12).

I find, contrary to the contentions of the Respondent, that these changes in the LBFO of September 5 were significant and material that would require further negotiations.

I also find that there was significant movement on the part of the Union at the September 5 bargaining session. At the September 5 session, the Union made significant verbal proposals. Although Dunker insisted to the employer that the unit employees wanted to stay with Teamsters Select, she also informed the Respondent's bargaining team that the Union would be amenable to the proposed 35-cent-an-hour wage increase if it was retroactive to the expiration of the old contract. I find that this to be a substantial concession in the Union's wage proposal which previously (as recent as the May 9 session), the Union had insisted on a 65-cent-an-hour increase.

It is also significant to note that for the first time, the Union was willing to consider an insurance plan with a HRA account. I find that Dunker credibly testified that she did not actively looked into the Teamsters insurance with a HRA account until the early fall because the plan was not previously available. The position of the Union in agreeing with the Respondent on the wage rate proposal and to consider an insurance plan with a HRA account was a significant shift in its bargaining position. Previously, the Union's bargaining position has always been to reject any insurance plan with a HRA component and to insist not less than a 65-cent-an-hour wage increase.

It is also worthy to note that there was also room to negotiate the extra \$10 weekly contribution to the healthcare insurance. Although the Union's position on the \$10 increase did not change, I find that Dunker was credible in stating that the \$10 contribution was negotiable. Eckstein believed the same as Dunker when he thought that further negotiations might prove fruitful because the Union might be willing to agree with a smaller increase in wages if the

employer was willing to decrease the \$10 weekly contribution.

With regard to the issue of impasse, I find that Eckstein's testimony was actually consistent with Dunker's understanding that there might be wiggle room on the dollar amout of the contribution and therefore, further discussion on the weekly contribution issue might prove fruitful.<sup>12</sup>

The Respondent contends that it has never waiver from its position to increase the weekly insurance contribution by an extra \$10 per week. The Union believed that the \$10 was negotiable because the Respondent had previously proposed to reduce the weekly contribution to \$5 per week on April 18 (GC Exh 39). The Respondent denies making such a proposal. A copy of the alternative April 18 Continued

In addition, Eckstein did not recall telling the Union that the parties were at impasse, but testified that Bachelder had mentioned impasse on September 5. Souter recalled that the parties discussed impasse on September 5. However, as noted above, Eckstein testified that the employer was also open to more negotiations and a contract.

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The record shows that Dunker did not outright reject the LBFO at the September 5 session, but was willing to take the offer to the bargaining unit employees for a ratification vote, despite having reservations over the terms of the offer. The Respondent was aware that the Union needed approval from the unit employees before agreeing to any proposal. This procedure has been consistent with the parties' bargaining history. The unit employees met on September 29 and the employees rejected the LBFO. The fact that there was a ratification vote rejecting the LBFO did not itself show that the parties were at impasse. The impasse issue turns on the *Taft* factors, above, and not on the mere fact of a negative ratification vote. *Ead Motors Eastern Air Devices, Inc.*, 346 NLRB 1060, 1063, 1064 (2006).

After being informed that the Union had rejected the LBFO, the Respondent nevertheless agreed to meet with the Union at Dunker's request on October 15. Bachelder's letter of October 5 to Dunker (GC Exh. 14), in part stated

We look forward to sitting down and hearing what new thoughts the Union may have to resolve this matter. As such, we are ready, willing and able to meet. Should you believe that the meeting will not fruitful (emphasis added), please let me know.

A genuine impasse exists when there is no realistic possibility that continuation of negotiations would be "fruitful" and both parties believe that they are "at the end of their rope." *Pratt Industries*, 358 NLRB No. 52 at 6 (2012). In considering the *Taft* factors, I find that the both sides had realistic possibilities that further negotiations might be fruitful based upon the adduced testimony of Eckstein and Dunker. It is also clear from Bachelder's letter that he believed further discussions may prove fruitful so long as the Union also believes the same.

I find that impasse may have been discussed at the September 5 session, but the parties were not at impasse. Souter recalls that impasse was discussed. Eckstein could not recall mentioning impasse, but believed that Bachelder did. Bachelder did not testify at the hearing. I believe the Union was bargaining in good faith over significant issues of wages and health insurance benefits as to which there were disagreements, but there was a contemporaneous understanding between the parties that further negotiations might prove fruitful for a number of reasons, to wit: the Union's agreeing to the Respondent's wage proposal (with other modifications); the possibility of the Union agreeing to an insurance with a HRA account; the parties' interest in further discussions on the amount of employee contributions; and the agreement between the parties to schedule another bargaining session.

proposal was entered into the record over the objections of the Respondent. The Respondent states that it never gave two proposals to the Union on April 18. Dunker insisted that both proposals were provided to her on April 18 (Tr. 155-158, 439-447). I credit the testimony of Dunker on this point. The April 18 proposal clearly reflects the Respondent's willingness to go down from \$10 to \$5 on the weekly contribution. There's no evidence that this document was fraudulent or unworthy of belief. In addition, I find that the alternative proposal for a \$5 contribution as being consistent with Eckstein's testimony that the issue of a reduced weekly contribution in exchange for the Union's concession to reduce wages was discussed. I find more likely than not that the Respondent prepared the alternative April 18 proposal for a reduced \$5 contribution based from those discussions.

Indeed, it is significant to note that the Respondent, despite its arguments to the contrary, did not believe the parties were at impasse on September 5. In a statement provided to the NLRB during the investigation of this complaint (Tr. 362, GC Exh. 41 at para 4; also GC Exh. 40) asking the employer to explain what was meant regarding the word "apply" when it applied for the new insurance plan on October 16, the Respondent clearly stated

Apply means apply, in other words, the formal application process of obtaining health insurance. Prior to this stage we were simply in an exploratory mode, not wanting to implement a unilateral change *but preparing ourselves in the event impasse was reached* (emphasis added)

From this statement, it was obvious that the Respondent did not believe the parties were at impasse on September 5 or even as of October 16 when it applied for the insurance.

Accordingly, I find that the parties were not at impasse on September 5.

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c. The unilateral change to the health care insurance during contract negotiations on September 26

An employer violates Section 8(a)(5) and (1) of the Act if it change the wages, hours, or terms and conditions of employment of represented employees without providing the Union with prior notice and an opportunity to bargain over such changes. See *NLRB v. Katz*, 369 U.S. 736, 743-747 (1962). The rationale for this rule is that if the employer is free to alter the very terms and conditions subject to negotiations, bargaining would become difficult. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991).

The Acting General Counsel argues that the Respondent violated Section 8(a)(5) and (1) of the Act when it made unilateral changes regarding matters that are subject to mandatory bargaining. The Acting General Counsel contends that unilaterally imposing a health insurance plan and changing wages on October 21 is a "material, substantial and significant change" in the terms and conditions of employment before the parties reached lawful impasse.

The counsel for the charging party argues that Respondent violated Section 8(a)(5) and (1) of the Act when the Respondent unilaterally implemented the new health insurance plan on September 26 during bargaining negotiations.

It is clear that health insurance is a mandatory subject of bargaining. See *Wire Products Manufacturing Corp.*, 329 NLRB 155 (1999); *Dynatron/Bondo* Corp., 323 NLRB 1263 (1997). There is no doubt that unilaterally imposing a new health insurance plan has a material, substantial and significant impact on the terms and conditions of employment of the bargaining unit employees. *NLRB v. Katz*, above; *Flambeau Airmold Corp.*, 334 NLRB 165 (2001), citing *Alamo Cement Co.*, 281 NLRB 737, 738 (1986).

The question is whether the Respondent made unilaterally changes in the healthcare insurance of the unit employees on September 26?

The counsel for the charging party argues that the Respondent bargained in bad faith when it commenced with the enrollment of the bargaining unit employees under the CDPHP insurance coverage on September 26 and therefore, tainted the negotiation process for a successor contract. The counsel contends that a good faith impasse could not occur because the employer engaged in an unlawful labor practice when it unilaterally converted the insurance coverage of the unit employees to the CDPHP insurance, which was a mandatory subject for

bargaining.<sup>13</sup> I agree with the counsel for the charging party.

The law is clear that "a lawful impasse cannot be reached in the presence of unremedied unfair labor practices." White Oak Coal Co., 295 NLRB 567, 568 (1989); La Porte Transit, 286 NLRB 132 (1987), enfd. 888 F.2d 1182 (5th Cir. 1989). I find that the Respondent violated Section 8(a)(5) and (1) of the Act by announcing unilateral changes to the health insurance plan on September 26 where no impasse was reached in bargaining. Indeed, the parties had agreed to talk further and in fact, scheduled another bargaining session on October 19.

I find, that the Respondent, by announcing the new health coverage and commencing with the enrollment of the unit employees would cause a reasonable employee to assume that on September 26, a condition of employment had changed, i.e., the Respondent's implementation of a new health insurance coverage. In *ABC Automotive Products Corp.*, 307 NLRB 248, 250 (1992), the employer communicated to the striking employees a final offer that could be implemented once the parties reached impasse. The Board found that such an announcement would cause a reasonable employee to assume that on returning to work, a condition of employment would have changed, i.e., the employer's implementation of a new health and welfare coverage, and held that the employer violated Section 8(a)(5) of the Act by announcing unilateral changes where no impasse was reached in the bargaining.

Here, the record establishes that the Respondent's management officials informed the unit employees that a last, best and final offer was made and rejected by the union. Eckstein testified that Bachelder (or himself) may have informed the unit employees that the parties had reached impasse, but then backpedaled and said he was unsure that impasse was mentioned. This would mean to me that the parties were still negotiating a contract. The Respondent then provided enrollment applications for the new insurance coverage and announced to the unit employees that they must begin enrolling in the new insurance on September 26 with most of the employees completing the enrollment application by early October. The employees also understood that the effective coverage date for the health insurance would be November 1 and that their weekly contribution to the new insurance would increase by \$10. The unit employees were also asked to provide their banking account numbers for the payroll deduction of the extra \$10 contribution for the new insurance.

Considering the totality of the circumstances occurring on September 26, the unilateral

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<sup>&</sup>lt;sup>13</sup> In the closing brief for the charging party, union counsel argues that, although the amended complaint did not specifically allege that the unilateral enrollment for the new insurance coverage on September 26 was an unlawful labor practice, this issue is nevertheless properly before me because the Respondent had interposed the affirmative defense of impasse. See, Union's closing brief, fn. 7. In my opinion, the complaint of the Acting General Counsel sufficiently alleges a violation of the Act when the Respondent unilaterally imposed material, substantial and significant changes in the terms and conditions of employment during negotiations, even though the imposition of the unilateral changes occurred earlier than alleged in the complaint. In Vico Products, Co., 583, 588 (2001), the Board held that though the antiunion animus statements were not the subject of individual unfair labor practice charges and not independently alleged in the complaint as Section 8(a)(1) violations of the Act, the antiunion statements should have been considered by the judge. The Board stated that acts displaying antiunion animus. though not alleged as independent violations, are "relevant in assessing the violations that were alleged," citing Bandag, Inc. v. NLRB, 583 F.2d 765, 767 (5th Cir. 1978). Similarly, allegations of unfair labor practices preclude a defense of lawful impasse is also relevant in assessing the violation that was alleged, namely, the premature unilateral imposition of mandatory subjects of bargaining during contract negotiations. I would also note that vigorous examination on this issue was fully undertaken by both parties during the hearing.

changes in the unit employees' health coverage were effectively implemented as far as they were concerned when the Respondent announced that enrollment would began on September 26 and that the employees would only return to work under this new condition of employment on November 1.

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Similar in circumstances to *ABC Automotive*, a reasonable employee would believe that the Respondent made unilateral changes when it announced to and began enrollment of the unit employees under a new insurance during bargaining. Even if the announced change in health insurance coverage had resulted differently on November 1, the damage to the bargaining relationship was accomplished. This occurred simply by the message to the employees that the Respondent was taking it on itself to set an important term and condition of employment, thereby suggesting the irrelevance of the employees' collective-bargaining representative in further negotiations. *Kurdziel Iron of Wauseon, Inc.*, 327 NLRB 155 (1998).

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Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) of the Act when it announced unilateral changes to the healthcare insurance of the unit employees on September 26 where no lawful impasse was reached in bargaining.

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d. The Respondent was not entitled to implement its final offer because the parties had not reached lawful impasse on October 21

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The Acting General Counsel argues that the Respondent implemented unilateral changes in the health insurance coverage and wages on October 21 without the parties reaching a genuine impasse on bargaining negotiations in violation of Section 8 (a)(5) and (1) of the Act.

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The Respondent argues that the parties were clearly at impasse on October 21. The Respondent also contends that the Union's proposal of October 24 was not a valid offer and did not break the impasse.

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Assuming the Respondent did not make unilateral changes on September 26 with the announcement of the new insurance coverage and the enrollment of the employees under the new plan, I now find that the Respondent imposed unilateral changes on October 21 when the parties were not at impasse.

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On October 15, the parties met briefly for another bargaining session. Dunker informed Bachelder and the Respondent's bargaining team of its intent to inform the public of the employer's unfair bargaining proposals and to urge a consumer boycott of the Respondent's products. The employer's bargaining team was visibly upset over the announced handbill campaign. They then left the negotiation table after presenting the LBFO to the Union. As noted, the LBFO of October 15 was essentially unchanged from the September 5 LBFO.

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On October 18, Bachelder informed Dunker in writing that the parties were at impasse. Dunker replied by email that she did not believe the parties were at impasse and implored the Respondent to return to the bargaining table and to hold off on implementation of the proposal for one week. Dunker also informed Bachelder that the unit employees were meeting on October 20 to discuss an alternative health insurance proposal.

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On the following day, Bachelder informed Dunker by letter that the employer's position on wages, benefits and any other negotiated terms are firm and that further discussions on the issues would be futile. He continued by stating "It is for these reasons that the parties are at

impasse." Nevertheless, Bachelder also noted in his letter that the employer was willing to schedule another round of negotiations and to discuss new proposals in light of Dunker's statements that the Union would be proposing an alternative agreement after meeting with the employees on October 20. Bachelder specifically stated to Dunker in his October 19 letter the following

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Your email indicates that you will be proposing an alternative agreement to the employees on Saturday. Assuming the new proposal is agreed by the employees, please advise so that we can schedule another round of meetings. Please understand that because we are at an impasse, continuing to meet with the Union to discuss new proposals from the Union does not mean we are not an (sic) impasse. It simply means we are continuing to negotiate in good faith.

Dunker testified that following her email on October 18, she also spoke to Bachelder on October 19 and reconfirmed that she was meeting with the unit employees on Saturday and would have an alternative proposal for the Respondent. She pleaded for Bachelder to hold off for one week on implementation since the full effect of the new insurance coverage was not until November 1. I fully credit her testimony on this point since Bachelder did not testify and there was no evidence to the contrary.

The parties were unable to meet before the Respondent unilaterally implemented the wage rate increase and the extra employee contributions to the CDPHP/HRA insurance plan on October 21. As noted above, the Union's written proposal was not presented to the Respondent until October 24.

In my opinion, I find that the parties were not at impasse on October 18 when Bachelder declared that the parties were at impasse. As the Board stated in *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973)

A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.

Here, despite Bachelder's insistence that the parties were at impasse, his declaration that an impasse has occurred will not be dispositive in determining whether one does exist. All of the circumstances of the case must be analyzed. *Circuit-Wise, Inc.*, 309 NLRB 905, 918 (1992). A close review of the communications between Dunker and Bachelder on October 18 shows a willingness on the part of the Respondent to look into the new proposal offered by the Union. At Dunker's request on October 18, Bachelder agreed to schedule another round of meetings and he was hopeful that the Union's meeting on Saturday on an alternative health insurance proposal will bring fruitful and meaningful discussions at the next bargaining session. This was followed with Bachelder's letter of October 19 which reiterated the Respondent's willingness to meet and discuss the proposal.

This set of circumstances is very similar to the facts in *Laurel Bay Health & Rehabilitation Center*, 353 NLRB 232 (2008), rev.d in part, sub nom. *Laurel Bay Health & Rehabilitation Center v. NLRB*, 416 F.3d 1365 (D.C.Cir. 2012). In that case, the union's proposal for the benefit fund was "nonnegotiable" with regard to the employer's contribution to the fund. At the last bargaining session, the union negotiator stated that if the employer was not willing to increase its contribution to the fund, the union was willing to "look at other plans." The union negotiator in that case also stated that he would prepare a counterproposal. Although the

employer claimed the parties were at impasse, the employer in *Laurel Bay* agreed to schedule another bargaining session. The Board held that the employer failed to carry its burden of proof that the parties were at impasse. The Board stated

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...that the parties had agreed to meet again, that the Union would be preparing counterproposals, and that there was at least professed flexibility on health insurance alternatives. While, the Respondent might have reasonably doubted the sincerity of the Union's stated willingness to move from its Benefit fund proposals, it did not test that doubt. Thus, we cannot concluded, as the Respondent contends, that the Union's August 23 representations was disingenuous and intended solely to stave off impasse.

I cannot conclude, as the Respondent contends, that Dunker's representations to Bachelder about the proposal on October 18 were disingenuous and intended to stave off impasse. *Laurel Bay*, above at 233. Here, Dunker informed the Respondent that the Union was considering an alternative insurance plan, that the alternative insurance plan would be considered by the unit employees, and that the Union was preparing a counterproposal. At her request, the Respondent was willing to schedule another round of bargaining sessions. These communications occurred on October 18 (and October 19), which was 3 days before the implementation date of October 21. Clearly, the Respondent was interested enough to what the Union might propose to agree to another bargaining session. As in *Laurel Bay*, the Respondent may have doubted the sincerity of the Union's willingness to move from its stated position on health insurance and did not believe the Union's proposal to be a valid offer. However, it did not test that doubt when it unilaterally implemented its health insurance and wage increase prior to meeting with the Union.

In reviewing the *Taft* factors as to whether impasse exists, I find that the parties were not at impasse on October 18.

Regarding the first factor of the parties' bargaining history, the record shows that the parties enjoyed over 20 years of bargaining history. Dunker testified without contradictions that the parties bargained until the last moment during negotiations of the expired contract before there was any movement on the insurance issue. Dunker said that the Union needed to negotiate directly with the company's owner in order to retain the Teamsters Select plan in the expired contract. I find that it reasonable from this bargaining history that additional negotiations would have resulted in some fruitful discussions of the insurance issue.<sup>14</sup>

I also considered the length of the negotiations. The parties stipulated to 14 bargaining sessions from June 2011 to October 2012. The Board has held that there is no set formula as to whether there are too many or too few bargaining sessions. *Atlanta Hilton & Tower*, 271 NLRB 1603 (1984). Although the Union never moved from its position to retain the Teamsters Select plan until late in the bargaining, the record reflects that negotiations were not static on the part of the Union. Among the items that demonstrate to me that the Union showed movement in its negotiations were: the consideration by the Union of an insurance plan with a HSA account in October 2011; the Union's tentative agreements to a number of contract provisions; the Union's concession to reduce its wage demand from 95 cents to 65 cents in

<sup>&</sup>lt;sup>14</sup> That is not to say that if the parties continued their sluggish bargaining that there would have been agreement on a new contract. Such a finding is not needed, nor could it be made without extra-record speculation. Whether their differences ever would have been resolved cannot be known; but that is the nature of the process. *Powell Electrical Mgf. Co.*, 287 NLRB 969, 974 (1987); enfd. as mod. 906 F.2d 1007 (5<sup>th</sup> Cir. 1990)

March; its willingness to accept the employer's proposal for a 35 cent-an-hour wage increase at the September 5 session; and its proposal of an insurance with a high deductible HRA account in October.

Another factor is the importance of the issue. There is no doubt that the insurance plan was a critical and paramount issue for both parties in this case. The Union insisted on retaining the Teamsters Select plan while the Respondent was steadfast in moving away from the union plan and replacing the insurance with a high deductible HRA account plan with an increase in employee contribution to the plan. However, the parties were not deadlock on October 18. There was movement on the part of the Union as communicated to Bachelder. Bachelder 10 listened to Dunker and felt that another round of meetings might be useful, despite not knowing all the details of the proposal.

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Regarding the good faith of the parties during bargaining, both parties "have a duty to negotiate with a sincere purpose to find a basis of agreement but an adamant insistence on a bargaining position is not of itself a refusal to bargaining in good faith." Calmat Co., above at 1099. The Respondent argues that the Union had bargained in bad faith because the Union bargaining committee did not have the authority to accept the employer's offer on health insurance. In determining whether a party has complied with the duty to bargain in good faith, the Board looks to whether the party's conduct "evidences a real desire to reach an agreement—a determination made by examination of the record as a whole." Chevron Chemical Co., 261 NLRB 44, 45 (1982), enfd. 701 F.ed 172 (5th Cir. 1983).

The Respondent also argues that the Union engaged in bad faith negotiations when it consistently rejected the employer's various proposals during bargaining despite trying to address the concerns of the Union with regard to wages and insurance coverage. The Respondent contends that the Union's last offer was a delaying tactic to stave off impasse. Under the first exception detailed in Bottom Line, an employer is permitted to unilaterally implement changes in conditions of employment, absent an overall impasse, "when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining." Bottom Line, above, at 374, citing M & M Contractors, 262 NLRB 1472 (1982).

As a general rule, specific contract proposals may be considered in determining whether a party has bargained in bad faith. However, the Board has held that a finding of bad faith does not alone depend on whether a proposal would be acceptable or unacceptable. Liquor Industry Bargaining Group, 333 NLRB 1219, 1220 (2001).

Although failure to designate an agent with sufficient bargaining authority may indicate a lack of good faith, this is not the situation here. In examining the totality of bargaining conduct, the record shows that Dunker made clear to the Respondent's bargaining committee from the beginning of the negotiations that any proposal needed ratification from the unit employees. Dunker understood the desires of the unit employees to keep the Teamsters Select plan and believe it would be unnecessary to present each new proposal every time to the unit employees for a ratification vote. However, Dunker did not sit on her hands to delay or attempt to avoid bargaining. She diligently explored under insurance options, like a HSA account and inquired information from the Respondent on various insurance plans; she met at least three times with the unit employees during negotiations; and she considered and proposed to the Respondent an insurance plan with a high deductible HRA account. The proposal by the Union of an alternative health insurance plan with a high deductible and HRA account was a significant and material change in its bargaining position. In the meanwhile, the parties bargained and were

able to negotiate tentative agreements on other terms and conditions of employment and the Union agreed to reduce its proposal on wages from 99 cents to 35 cent-an-hour increase.

I find that Dunker was sincere and committed to reach an agreement, but was simply representing the desire of her union membership to retain as long as possible the Teamsters Select plan. It is not sufficient for a finding of impasse to merely show that the Respondent had lost patience with the Union. While the Respondent may have been impatient with the Union's pace in agreeing to concessions on healthcare, its frustration is not the equivalent of a valid impasse or that a negotiated settlement was not within reach. *Newcor Bay City*, above; *Grinnell Fire Systems, Inc.*, above; *Powell Electrical*, above, 973-974 (futility not some lesser level of discouragement or apparent gamesmanship is necessary to establish impasse).

In that context, I regard the Union's response that the Respondent was not offering anything that Dunker could recommend as an understandable expression of dissatisfaction with the position taken by the Union and not as an effort to avoid bargaining. The Board as held that such a response is not reasonably interpreted as a firm indication of the Union's unwillingness to negotiate further or make additional concessions. *Cotter & Co.*, above at 787, 788.

Regarding the contemporaneous understanding of the parties as to the state of negotiations, the record is clear that both parties believed to the merits of scheduling another bargaining session after the Respondent declared impasse on October 18. The Board has taken account whether the parties continue to meet and negotiate as a factor that the parties were not at an impasse. *Ead Motors Eastern Air*, above; also, *Wayneview Care Center*, 352 NLRB 1089 (2008).

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Contrary to the Respondent's arguments, the Union's proposal of October 24 was a valid offer. The Union's proposal on health insurance, although it remained with the Teamsters, had a high deductible HRA component, which as noted, was a significant change from its previous position. The Union did not move on the employee contribution (which it believed was negotiable), but did agree to reduce its wage rate proposal to a 35 cent-an-hour increase, which was also a material departure from its previous position for a 65 cent increase.

Another factor that I considered was the Union's demonstrated flexibility and willingness to compromise on a critical issue in an effort to reach an agreement. *Cotter & Co.*, above at 787. The Union substantially changed its previous static position on the health insurance issue. The Union no longer insisted on retaining the Teamsters Select plan. The Union's proposal moved to a high deductible HRA account insurance plan and the proposed HRA contributions were identical to the employer's proposal.

In light of the willingness of the Union and Respondent to continue bargaining, I cannot find that the parties were at deadlock on October 18. *Newcor Bay City Division*, above, 1239.

Assuming there was impasse on October 18, the impasse was broken by Dunker's verbal discussion with Bachelder regarding the Union's verbal proposal on October 18. Anything that creates a possibility of fruitful discussion breaks an impasse (even if it does not create a likelihood of an agreement). *PRC Recording Co.*, 280 NLRB 615, 636 (1986);

<sup>&</sup>lt;sup>15</sup> The situation here is distinguishable from *ACF Industries*, 347 NLRB 1041 (2006), cited by the Respondent. In *ACF*, the Board held that absent a concrete proposal from the Union, the parties were at impasse. Here, by October 18, Bachelder was sufficiently aware from his discussions with Dunker about the Union's proposal to show a willingness to meet and bargain over this proposal.

Pavilions at Forrestal, 353 NLRB 540, 540 (2008). Impasse is a recurring feature in the bargaining process, which is only a temporary deadlock or hiatus in negotiations, eventually broken in almost all cases through either a change of mind or the application of economic force. Charles D. Bonanno Linen Service v. NLRB, 454 U.S. 404, 412 (1982).

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I find that if there was an impasse on October 18, it was immediately broken when Dunker spoke to Bachelder on the same day and communicated to him on the following day about a new health proposal. Bachelder knew on October 18 that the Union was meeting to consider that proposal on Saturday and that Dunker would be presenting an alternative plan to the Respondent after that meeting. Bachelder was surprised by the Union's proposal and his willingness to return to the bargaining table certainly created a new possibility of fruitful discussion that would break the impasse. *Laurel Bay*, supra at 246. Even if Dunker did not fully articulate to Bachelder the details of the Union's insurance plan on October 18 and the Respondent did not believe the Union had changed its position, there was clearly movement to break any purported impasse.

Although Bachelder did not receive the proposal until October 24, he believed that the Union's offer was sufficiently genuine after receiving Dunker's email of October 18 and discussing the matter further on October 19 to schedule a meeting to discuss the new proposals, as evidenced by his October 19 letter to Dunker. Further, it is not enough that the party asserting impasse believes that it has been reached. There must be a "contemporaneous understanding" by the parties that further bargaining would be futile. See, e.g., *Newcor Bay City Div.*, 345 NLRB 1229, 1238 (2005). The contemporaneous understanding of the parties as of October 18 was that the Union's latest proposal was significant enough for the Respondent agreed to another bargaining session.

The Respondent argues in the alternative that if impasse was broken when it received the Union's proposal, the parties were still at impasse with regards to the single issue of health insurance coverage.

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Impasse over a single issue may create an overall bargaining impasse. A single issue, such as the critical health insurance negotiations, may be of such overriding importance that it justifies an overall finding of impasse on all of the bargaining issues. *CalMat Co.*, above at 1097. Although it is possible for an impasse to come into existence over a single issue, I note that where one of the parties asserts that a single issue is the cause of an impasse, the burden is far greater than normal. In *CalMat Co.*, above, the Board stated that in such a case, the party asserting a single issue impasse must establish

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First the actual existence of a good faith bargaining impasse; second, that the issue as to which the parties are at impasse is a critical issue; third, that the impasse on this critical issue led to a breakdown in the overall negotiations – in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved

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Here, the Respondent failed to establish the first and third element of the defense. The Respondent prematurely declared impasse when the parties had not reached a good faith bargaining impasse. As to the first element, the Respondent declared impasse on September 5, but continued to bargain. While bargaining, the Respondent unilaterally commenced the enrollment of the unit employees under the new insurance plan on September 26. The parties again continued to bargain until Bachelder declared an impasse on October 18, but then agreed on the same day to resume bargaining upon Dunker's request. Considering all these circumstances, I find that the Respondent had not reached a good faith impasse.

Even assuming that there was impasse on the critical issue of health insurance, the Respondent has not established the third element of its defense: "that the impasse on this critical issue led to a breakdown in the overall negotiations—in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved." *CalMat*, 331 NLRB at 1098. As described, after the Respondent proposed its LBFO on October 15, Bachelder then agreed with Dunker on October 18 and 19 that the Respondent would meet and continue to discuss the health insurance proposal made by the Union. That movement confirmed to me that progress on the critical issue of health care was possible. There could be no doubt that health insurance was of a critical issue and overriding importance, but it did not lead to a breakdown in the overall negotiations. Impasse did not occur on October 18. As noted above, as soon as Bachelder declared impasse on October 18, Bachelder agreed with Dunker on the same day to return to the bargaining table.

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If there was impasse, it was immediately broken later that day when Dunker suggested that the Union was considering another health plan on Saturday and was prepared to present a counteroffer. Dunker requested another bargaining session. Bachelder was surprised at the counteroffer and agreed to meet again. Such statements support a finding of no impasse. *Ead Motors Eastern Air Devices*, above; *Erie Brush & Manufacturing Corp*, 357 NLRB No. 46 (2011), rev'd sub nom. *Erie Brush & Manufacturing Corp. v. NLRB*, 700 F.3d 17 (D.C.Cir. 2012).

Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) of the Act when the parties were not at impasse prior to the Respondent unilaterally implementing changes in its health insurance coverage, employee contribution to the health plan and wage rates on October 21. I also find that if an impasse had occurred, it was broken by the Union's proposal of October 18.

#### Conclusions of Law

- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
  - 2. The Union, Teamsters Local Union No. 693, is a labor organization within the meaning of Section 2(5) of the Act.
  - 3. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally announcing and commencing the enrollment of unit employees on September 26, 2012 for new health benefits, without bargaining to an overall lawful impasse in contract negotiations.
  - 4. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its last, best and final offer on October 21 and November 1, 2012 without bargaining to an overall lawful impasse in contract negotiations.
  - 5. The Respondent's above described unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

#### Remedy

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section (a)(5) and (1) of the Act, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent shall be required to make whole its unit employees for any losses they suffered or

expenses they incurred, including increased insurance premium and contributions cost, that resulted from the Respondent's unlawful changes in healthcare insurance. Make whole amounts owed to employees under this Order are to be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970); with interest on such amounts to be computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); and the interest compounded daily as prescribed in *Kentucky River Medical*, 356 NLRB No. 8 (2010).

On these findings of fact and conclusion of law and on the entire record, I issue the following recommend<sup>16</sup>

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#### Order

The Respondent, Mountainside Farms, a Division of Worcester Creameries Corp. at Roxbury, New York, its officers, agents, successor, and assigns, shall

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#### 1. Cease and Desist from

(a) Failing and refusing to bargain collectively in good faith with the Union, Teamsters Local Union No. 693 as the exclusive bargaining representative of the employees in the following appropriate unit:

All full-time regular employees employed by Respondent at its Roxbury, New York plant; excluding Department Heads, Managers, Assistant Managers, Supervisors, Field Men, Maintenance Engineers and Office Employees.

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- (b) Failing and refusing to bargain in good faith with the Union as the exclusive representative of employees in the appropriate unit set forth in 1(a) above by premature impasse declarations, by implementing a last and final contract offer without having reached a valid impasse and by eliminating the health insurance plan previously provided to the unit employees.
- (c) Failing and refusing to bargain collectively with the Union by unilaterally changing the health insurance plan of the unit employees without first bargaining to an overall impasse.

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- (d) Failing and refusing to bargain collectively with the Union by unilaterally changing the terms and conditions of employment of the unit employees without first bargaining to good faith impasse.
- (e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
  - 2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

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(a) Upon request by the Union, bargain collectively in good faith with the Union as the exclusive representative of the employees in the bargaining unit set forth in subsection 1(a)

<sup>&</sup>lt;sup>16</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

above, and embody any understanding reached in a signed agreement.

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(b) Upon request by the Union, restore employment terms and conditions of the bargaining unit set forth in subsection 1(a) to the levels prior to October 21, 2012, including the restoration of the health plan that was eliminated at the time of impasse, and maintain them until such time as the parties have bargained in good faith and reached agreement, or alternatively, until a valid impasse reached, but nothing in this Order is to be construed as requiring the Respondent to cancel any unilateral changes that benefit the unit employees without a request from the Union.

(c) Upon request by the Union, reinstate the health insurance coverage plan (aka Teamsters Direct) for unit employees that it terminated.

- (d) Upon request Union, make whole all bargaining unit employees for the losses they suffered as a result of the Respondent's unilateral changes in the health insurance coverage, wages and any other changes in the terms and conditions of employment, plus interest.
- (e) At the Union's request, rescind any unilateral changes it has implemented in its employees' terms and conditions of employment that were applicable prior to October 21, 2012.
- (f) Preserve and, within fourteen (14) days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payments records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay and other adjustments of monetary benefits due under the terms of this Order.
- (g) Within fourteen (14) days, post at the Respondent's Roxbury, New York facility, a copy of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 21, 2012.

<sup>17</sup> If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

|    | (h) Notify the Regional Director in writing wasteps the Respondent has taken to comply. | vithin 21 days from the date of this Order w | hat |
|----|---|--|-----|
| 5  | Dated: Washington, D.C., November 5, 2013.  |  |     |
| 10 |   | Kenneth W. Chu<br>Administrative Law Judge   |     |
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#### **APPENDIX**

#### **NOTICE TO EMPLOYEES**

#### Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefits and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain collectively with the Union (Teamsters Local Union No. 693) as your exclusive representative of the employees in the following unit:

All full-time regular employees employed by Respondent at its Roxbury, New York plant; excluding Department Heads, Managers, Assistant Managers, Supervisors, Field Men, Maintenance Engineers and Office Employees.

WE WILL NOT refuse to bargain collectively with the Union by unilaterally implementing terms and conditions of employment of our employees in the unit described above in the absence of an overall lawful bargaining impasse.

WE WILL NOT unilaterally change the healthcare insurance of the employees in the unit described above without bargaining to an overall lawful bargaining impasse.

WE WILL NOT otherwise make changes to the terms and conditions of employment our employees without first bargaining to good faith impasse with your Union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL restore and resume participation in the health insurance coverage (New York State Teamsters Council Health and Hospital Fund Select Care Plan) of all employees employed in the unit described above that we unilaterally terminated without bargaining with the Union to an overall good faith impasse.

WE WILL upon request by the Union rescind any or all changes in the terms and conditions of employment that we made without bargaining with the Union to an overall good faith impasse.

WE WILL make whole, with interest, to all bargaining unit employees for any losses suffered as a result of the changes in the terms and conditions of employment without bargaining to good faith impasse with the Union.

WE WILL upon request by the Union, meet and bargain collectively in good faith with the Union as the exclusive representative of the employees in the bargaining unit described above and if an understanding is reached, embody such understanding in a signed agreement.

## Mountainside Farms <u>a Division of Worcester Creameries, Corp.</u> (Employer)

| DATED: | BY |                  |         |
|--------|----|------------------|---------|
|        |    | (Representative) | (Title) |

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

130 S. Elmwood Avenue Suite 630

Buffalo, NY 14202-2387 (716) 551-4931

#### THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 716-551-4946.